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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. ~~73~~ 73 - 1026

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

VS.

LEE SCOTT NUNN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this cause on October 1, 1973.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported in 55 Ill. 2d 344, —— N.E. 2d —— (1973) and is printed as Appendix A. The opinion of the Appellate Court of Illinois is reported in 7 Ill. App. 3d 601, 288 N.E. 2d 88 (1973) and is printed as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on October 1, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the Fourth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, protects an expectation of privacy dependent upon a personal confidence.

CONSTITUTIONAL PROVISIONS

United States Constitution

Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Fourteenth Amendment

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The defendant was indicted for the offenses of Unlawful Possession of Narcotics and Unlawful Possession of Hypodermic Needles and Syringes. Prior to trial the defendant filed a motion to suppress physical evidence. At a hearing on that motion and by stipulation the following matters were adduced. (E. 6).

In early 1971 the defendant, a nineteen year old, was living with his mother, Mrs. Rose Ann Nunn, in her home at 714 South State, Champaign, Illinois. (E. 10). The defendant occupied a bedroom attached to a kitchenette. (E. 15, 22). Mrs. Nunn regularly entered this bedroom to clean her son's clothing and to make his bed; she was in no way restricted from entering the room. (E. 12, 23). Defendant paid no rent, but gave Mrs. Nunn five to ten dollars a week intermittently. (E. 6).

A week to ten days prior to March 9, 1971, the defendant moved from his mother's house. (E. 11, 16). Upon doing so he locked the door to the room he had occupied and told his mother to allow no one to enter the room. (E. 19, 22). The father of the defendant, Mrs. Nunn's exhusband, attempted to have the police search his son's room; however, they refused. (E. 9).

Concerned about her son's activities and having consulted his father, on March 9, 1971, Mrs. Nunn executed a written authorization for the Champaign police to search her home. (E. 17-20). Subsequently, Mrs. Nunn admitted an Officer Repp of the Champaign police into her home and pointed out her son's room. (E. 13). Officer Repp unlocked the door to the room with a skeleton key. (E. 13). In Mrs Nunn's presence Officer Repp entered the room and found certain items in a wastebasket in the

kitchenette. (E. 15). On the basis of these items the defendant was indicted. (E. 1, 2, 3).

Defendant's pre-trial motion to suppress these items "for the reason that the defendant's Fourth Amendment rights to be free from unlawful search and seizure were violated." (E. 6). This action was affirmed by the Appellate Court of Illinois, Fourth District, with one Justice dissenting. (Appendix B). An appeal was taken to the Illinois Supreme Court. That Court affirmed with three Justices dissenting. (Appendix A).

The Court's opinion, on the basis of *Katz* v. *United States*, 389 U.S. 347 (1967), held that the instant search was violative of defendant's Fourth Amendment freedoms.

ARGUMENT FOR GRANTING THE WRIT

THE REPEATED INDICATIONS OF THIS COURT THAT THE RISK OF HAVING A PERSONAL CONFIDENCE BETRAYED IS A CIRCUMSTANCE INHERENT IN THE CONDITIONS OF HUMAN SOCIETY WHICH IS NOT PROTECTED BY THE FOURTH AMENDMENT HAVE BEEN CONTRAVENED BY THE SUPREME COURT OF ILLINOIS IN THE INSTANT DECISION.

The crucial portion of the reasoning of the Illinois Supreme Court's decision in the instant case occurs at 55 Ill. 2d 352, —— N.E. 2d ——, wherein the court stated:

> Regardless of whether the defendant had a reasonable expectation of privacy before the door was locked, there is no doubt that such an expectation was reasonable in view of his mother's past actions in the room, and her failure to object to his request that she was not to open the locked door. The property right of the mother in the locked rooms should be considered only to the extent that it bears on the *reasonableness of the defendant to expect her not to exercise those rights.* In view of the entire factual situation involved, we find that the *defendant reasonably expected that his mother would neither enter* the quarters herself, *nor allow others to enter.*
>
> Having established that the defendant had a reasonable expectation of privacy in the locked quarters, the seizure of the contraband was in violation of his fourth amendment rights if no valid waiver of those rights was effected.
>
> There is no evidence in the record which tends to establish that the defendant voluntarily waived his fourth amendment rights.

It is clear from the opinion of the court that its determination that the defendant had a reasonable expectation of privacy was based upon its judgment that the defendant's expectation that his mother would not act to allow others to enter the room was justified. The court viewed Mrs. Nunn's consent to the police as ineffectual because it violated this expectation.

It may well be that Mrs. Nunn, by her silence, did implicitly promise her son that she would not allow entry into the room; and it may well be that the defendant, considering his past experience with his mother, reasonably expected that she would keep her silent promise. However, no matter how reasonable the defendant's expectation was, it was a reliance upon a personal confidence and such reliance is not protected by the Fourth Amendment as applied to the States through the Due Process Clause of the Fourteenth Amendment. *Hoffa* v. *United States*, 385 U.S. 293 (1966); *On Lee* v. *United States*, 343 U.S. 747 (1952); *Lopez* v. *United States*, 373 U.S. 427 1963); *United States* v. *White*, 401 U.S. 745 (1971).

In *Hoffa* a government informer used his acquaintance with the defendant to gain entrance to his hotel room wherein he heard incriminating statements. The defendant attacked the obtaining of these statements as being violative of his Fourth Amendment rights. This Court rejected the defendant's argument holding that personal confidences are not protected by the Fourth Amendment, noting at p. 302:

> The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrong doing.

While *On Lee, Lopez,* and *White* also involve the element of the employment of electronic devices, they all stand firmly for *Hoffa's* proposition that personal confidences are not protected by the Fourth Amendment. *White* further establishes that these decisions were not disturbed by this Court's opinion and decision in *Katz* v. *United States,* 389 U.S. 347 (1967):

> Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), which was left undisturbed by *Katz,* held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment. * * * In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrong-doer's misplaced belief * * *" 401 U.S. 749.

The Illinois Supreme Court found *Katz* to be controlling in the present situation. However, in applying *Katz* the court failed to note *Hoffa's* exclusion of personal confidences from Fourth Amendment protection. Clearly, the Illinois Supreme Court felt that the defendant's expectation that his mother would not allow anyone to enter the room was protected by the Fourth Amendment; however, it is equally clear from the above noted decisions of this Court that this misplaced personal confidence was not a matter within the ambit of constitutional protection.

Once it is recognized that defendant's reliance upon his mother's implied promise is not a matter cognizable under Fourth Amendment considerations, the focus of the case becomes whether an uncontested sole owner of premises can validly consent to a search thereof. The State wholeheartedly agrees with the Illinois Supreme

Court that what constitutes a reasonable expectation of privacy should not be dependent upon subtle and technical aspects of property law. However, this is not to say that the determination of what is a reasonable expectation of privacy is not very dependent upon basic social concepts of property.

It has been stipulated between the parties in this matter that, although the defendant did "intermittently" give his mother five or ten dollars, he "paid no rent." He was not relying upon a general status as a rent paying tenant, but upon a personal confidence in a particular person.

It should be noted that in the instant case the defendant had moved from the premises a week to ten days before the consent search. At the time of the consent search, therefore, Mrs. Nunn was not only defendant's parent and sole owner of the premises, but sole occupant of the premises as well. The right of one who has immediate control and occupancy of premises under circumstances stances similar to the instant situation has been upheld by a substantial number of cases, and has been indicated by this Court to be valid. *United States* v. *Stone,* 401 F. 2d 32; *People* v. *Koshiol,* 45 Ill. 2d 573, 262 N.E. 2d 446; *People* v. *Haskell,* 41 Ill. 2d 25, 241 N.E. 2d 430; *State* v. *Kinderman,* (Minn.) 136 N.W. 2d 577; *Mears* v. *State,* 52 Wis. 2d 435, 190 N.W. 2d 184; *State* v. *Vidor,* 75 Wash. 2d 607, 452 Pac. 961; *People* v. *Thomas,* 120 Ill. App. 2d 219, 256 N.E. 2d 870; *Abel* v. *United States,* 362 U.S. 217; *Collidge* v. *New Hampshire,* 402 U.S. 443; *Bumper* v. *North Carolina,* 391 U.S. 543. There is an excellent discussion of the application of these cases to the present situation in the dissenting opinion of Mr. Justice

Trapp in Appendix B. It is apparent in the instant case that even the defendant recognized a power in his mother to enter the room by the very fact that he requested her not to allow anyone to enter.

Furthermore, considering that the underlying purpose of the exclusionary rule is the deterence of improper police conduct, that rule should not be employed in the present case. The conduct of the police was exemplary. They completely refused a request to search from the defendant's father without a written authorization from the defendant's mother, the owner of the premises. And even after such consent was given they conducted the search of the premises only in the presence and at the direction of the owner-parent. As noted in the dissenting opinion of Mr. Justice Schaefer, joined in by Mr. Chief Justice Underwood and Mr. Justice Ward:

> What is significant is the reasonableness of the conduct of the police officers. Viewed from their perspective, the record shows that they were asked by the defendant's mother to open the locked door and search the area in which the suppressed articles were found. I see nothing in the stipulated facts to indicate that the police officers had been informed of any restrictions upon the mother's right to ask them to do what they did. And in the absence of such an indication, it seems to me that neither they nor we should be concerned with the details of any unusual conditions relating to the minor defendant's occupying of a portion of his mother's apartment.

In summary, therefore, it should be noted: The risk of having a personal confidence, well founded or not, betrayed "is probably inherent in the conditions of human society" and is not protected by the Fourth Amendment.

The defendant was not relying upon the privacy of the bedroom but upon a misplaced confidence that his mother would not search or consent to a search of that room. His reliance was not a constitutionally protected one, and Mrs. Nunn, as parent and sole owner and occupant of the premises, was fully capable of consenting to a search of those premises. Furthermore, the conduct of the Champaign police in the instant situation was exemplary, and such conduct should not be detered.

The exclusion of the fruits of the present search on a constitutional basis was clearly a misapplication of Fourth Amendment standards. This Court should issue a writ of certiorari in order that the error of the Supreme Court of Illinois might be remedied.

CONCLUSION

The defendant's reliance upon a personal confidence was not a constitutionally protected interest and, therefore, the evidence involved in this cause was not obtained in violation of the defendant's constitutional rights and should not have been suppressed.

WHEREFORE, the People of the State of Illinois pray that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PEOPLE v. NUNN

55 Ill. 2d 344

(No. 45560.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. LEO SCOTT NUNN, Appellee.

Opinion filed October 1, 1973.

1. CRIMINAL LAW—*when search warrant is not required.* The fourth amendment protects people and not "areas" against unreasonable searches and seizures, and a search is reasonable if there is probable cause for the search and a warrant can be issued only on a showing of this probable cause, but a warrant is not required in cases of "hot pursuit," in searches made "incidental to arrest" or where the party searched gives his consent. (p. 347)

2. SAME—*when warrant or personal consent to search is necessary.* Even where a consent to search premises is given by a co-occupant, if the person whose premises are searched has an actual and reasonable expectation of privacy notwithstanding the co-occupant's consent, then either a warrant or the personal consent of the owner must be obtained. (p. 348)

3. SAME—*person to be searched must be informed of his legal rights.* A police officer seeking consent to a search should inform the party to be searched of his right not to be searched without a warrant, the purpose of such information being to provide a meaningful basis for the consent. (p. 349)

4. SAME—*when evidence seized is properly suppressed —consent.* Evidence seized without warrant from defendant's room in a home where he lived with his mother is properly suppressed in a prosecution for unlawful possession of narcotics, even though defendant's mother gave the police written consent to search the room after defendant had left and locked the door with instructions to let no one enter, as in such case the defendant had reasonable expectation of privacy and a search without warant was unauthorized. (p. 352)

SCHAEFER, J., UNDERWOOD, C.J., and WARD, J., dissenting.

APPEAL from the Appellate Court for the Fourth District; heard in that court on appeal from the Circuit Court of Champaign County; the Hon. FREDERICK S. GREEN, Judge, presiding.

WILLIAM J. SCOTT, Attorney General, of Springfield JAMES B. ZAGEL and THOMAS M. BURNHAM, Assistant Attorneys General, of counsel), for the People.

DONALD M. RENO, JR., of RENO, O'BYRNE & KEPLEY, of Champaign, for appellee.

MR. JUSTICE DAVIS delivered the opinion of the court:

The defendant was charged with the unlawful possession of narcotics, hypodermic needles and syringes on the basis of certain items of physical evidence seized during a search of his locked quarters, consisting of a bedroom and adjoining kitchenette, accessible only therefrom, without a search warrant and without his consent. The search was consented to by his mother, in whose house the bedroom and kitchenette were located. The circuit court of Champaign County granted the defendant's motion to

suppress this physical evidence. The appellate court affirmed (7 Ill. App. 3d 601), and we allowed the petition for leave to appeal at the January 1973 term.

The following facts have been stipulated to:

"On May 17, 1971, a hearing was held before the Honorable Frederick S. Green of the Circuit Court of the Sixth Judicial Circuit, Champaign County, Urbana, Illinois, on a motion to suppress certain evidence which was seized during the search on March 9, 1971, of the premises at 714 South State Street, Champaign, Illinois, the home of Mrs. Rose A. Nunn, mother of Defendant-Appellee.

On March 9, 1971, the date of the search, Defendant was nineteen years of age and had lived in Mrs. Nunn's home. During the time Defendant lived in Mrs. Nunn's house, there were no restrictions on her access to his room and no conversation whether police could enter therein. Mrs. Nunn's only activity in Defendant's room was to clean it, to make his bed and to change the linen. Defendant paid no rent, but gave Mrs. Nunn five to ten dollars a week intermittently. Defendant could not recall the date he last worked prior to March 9, 1971.

Mrs. Nunn became concerned about the activity in her home during her absence when she returned once and found a marble top table broken. She discussed her concern with her former husband, the father of Defendant. Mr. Nunn unofficially tried to effect a search of Defendant's room by the police. Police declined unless Mrs. Nunn gave written consent. She went to the police station and gave written consent. She accompanied police officers to her home and was present during the search thereof. Police utilized their pass key to facilitate entry to Defendant's room.

The evidence, which was the subject of the motion to suppress, was seized from a waste basket and a cabinet over the sink both located in the kitchen.

This kitchen was accessible only from Defendant's room.

Approximately ten to fourteen days next preceding the search, Defendant 'moved out', locked the door to his room and told Mrs. Nunn to allow no one to enter.

The Court found: that the area in which the suppressed articles were found had been set aside by the mother of the Defendant for his exclusive use, subject to her using the area for maintenance purposes and for caring for his personal effects, and that said mother had no authority to consent to the search. The Court allowed the motion to suppress."

The Federal and State courts, on varying factual circumstances, have not always been consistent in their conclusions in regard to the fourth-amendment rights of the party searched, where a co-occupant, third-party, has consented to a search and seizure.

The problem is not a new one in Illinois. Generally stated, we have followed the rationale that an equal or greater right to the use or occupancy of premises gives such co-occupant the right of consent to a search of the premises, and that any evidence found therein is admissible against a nonconsenting co-occupant. *People* v. *Koshiol* (1970), 45 Ill. 2d 573; *People* v. *Haskell* (1968), 41 Ill. 2d 25; *People* v. *Palmer* (1964), 31 Ill. 2d 58; *People* v. *Palmer* (1962), 26 Ill. 2d 464; *People* v. *Stacey* (1962), 25 Ill. 2d 258; *People* v. *Speice* (1961), 23 Ill. 2d 40; *People* v. *Perroni* (1958), 14 Ill. 2d 581; *People* v. *Shambley* (1954), 4 Ill. 2d 38.

The theory underlying these cases was not that the co-occupant was waiving another's right, but that he was exercising his own rights in consenting to the search. The

questions of waiver, agency, apparent authority, and the like, were not reached under this theory.

In *Katz* v. *United States* (1967), 389 U.S. 347, 353, 19 L. Ed. 2d 576, 583, 88 S. Ct. 507, the court, in considering third-party searches and seizures, did not deem it important that the consent comes from one who has an equal or greater right to occupancy or use of the premises. The *Katz* test is based on the rationale that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures ***." It provides that a search will be reasonable only where there is probable cause for the search, and that a warrant may be issued only upon a showing of this probable cause. There are exceptions to this warrant requirement in cases of "hot pursuit" and in connection with searches made "incidental to arrest," and where the party searched gives his consent. The United States Supreme Court has consistently held that the fourth and fifth amendments overlap in restricting the power of the States (*Boyd* v. *United States* (1886), 116 U.S. 616, 29 L. Ed. 746), since they have the same basic purpose of maintaining inviolate large areas of personal liberty. *Feldman* v. *United States* (1944), 322 U.S. 487, 88 L. Ed. 1408, 64 S. Ct. 1082.

The purpose of the fourth-amendment warrant requirement is to assure that the decision as to whether there is probable cause to invade the privacy of the party to be searched is left to a neutral observer. Where the warrant is omitted, because of the consent search, this critical decision is left to the police officer, rather than a neutral observer. *Johnson* v. *United States* (1948), 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367.

The person searched must have an actual expectation of privacy, and this expectation must be reasonable. If such a reasonable expectation does exist, then either a warrant or the personal consent of the owner must be obtained. This general rule has been followed in *Combs* v. *United States* (1972), 408 U.S. 224, 33 L. Ed. 2d 308, 92 S. Ct. 2284; *Mancusi* v. *DeForte* (1968), 392 U.S. 364, 20 L. Ed. 2d 1154, 88 S. Ct. 2120; *United States* v. *Kahan* (S.D.N.Y. 1972), 350 F. Supp. 784; *United States* v. *Poole* (E.D. La. 1969), 307 F. Supp. 1185. Other cases following this basic theory have been faced with the question of what constitutes a valid waiver and have held that a *Miranda*-type warning should be given. (*United States* v. *Moderacki* (D. Del. 1968), 280 F. Supp. 633; *United States* v. *Blalock* (E.D. Pa. 1966), 255 W. Supp. 268; *United States* v. *Nikrasch* (7th Cir. 1966), 367 F. 2d 740.) However, in the recent case of *Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218, 248-9, 36 L. Ed. 2d 854, 875, 93 S. Ct. 2041, 2059, the United States Supreme Court stated: "Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

We acknowledge that the holding of the United States Supreme Court in *Katz*, that the fourth amendment protects people and not places, is not wholly consistent with the existing Illinois law on the subject. Therefore, to the extent that the *Shambley* line of cases is inconsistent with *Katz*, it is overruled.

The reason for furnishing the person to be searched with knowledge of his legal rights to exclude such search

is to provide him with a meaningful basis for a choice. (*Johnson* v. *Zerbst* (1938), 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019.) It has been held that a police officer seeking consent to search should be required to inform the party to be searched of his right not to be searched without a warrant. *United States* v. *Moderacki* (D. Del. 1968), 280 F. Supp. 633; *United States* v. *Blalock* (E.D. Penn. 1966), 255 F. Supp. 268; *United States* v. *Nikrasch* (7th Cir. 1966), 367 F. 2d 740.

The reasonable expectancy test leads us to an examination of whether in the case at bar, as a factual matter, the defendant's expectancy of privacy in the place where the seized property was located was reasonable, and if so, whether the purported third-party consent to the search was valid.

The general proposition that the law concerning search and seizure should not be based on the historic technicalities of the property law has been determined by the United States Supreme Court as follows: " *** it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. *** we ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." *Jones* v. *United States* (1960), 362 U.S. 257, 266, 267, 4 L. Ed. 2d 697, 705, 706, 80 S. Ct. 725.

Therefore, we look to waiver concepts to uphold the validity of a consent search. The appropriate standard

for waiver of the fourth-amendment rights was recently set forth in *Schneckloth* v. *Bustamonte* (1973), 412 U.S. 218, 248-9, 36 L. Ed. 2d 854, 875, 93 S. Ct. 2041, 2059. That test is whether consent was voluntarily given. "Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

It has always been held that a person may waive his constitutional rights. It has also never been held that the fourth amendment bars searches and seizures other than those which are unreasonable. On the basis of the facts in this case, which indicate that the defendant's mother knew that she was not to enter his quarters or to allow anyone else to do so, the defendant had a reasonable expectation of privacy therein.

In *State* v. *Kinderman* (1965), 271 Minn. 405, 136 N.W. 2d 577, *cert. denied*, 384 U.S. 909, the court held that a homeowner may give valid consent to search all of the rooms of his home, regardless of the age or relationship of the owner of the articles to the owner of the home, at least if no *bona fide* landlord-tenant relationship exists. In *Kinderman* the court held, three judges dissenting, that the father of a 22-year-old son, who was living in the father's house, could by freely and willingly giving his consent to a search of the entire house, make any search of that house reasonable. It held that since the fourth amendment does not prohibit all searches and seizures, but only unreasonable ones, and since the consent of the owner or person in charge of the premises—the father

in that case—was freely and willingly given, the evidence discovered during such a search was admissible. *Kinderman* has been explicitly followed by the courts of Washington (*State* v. *Vidor* (1969), 75 Wash. 2d 607, 452 P. 2d 961, 962-963) and Maryland (*Jones* v. *State* (1971), 13 Md. App. 309, 283 A. 2d 184, 187). A similar approach has been used by the State of Kentucky. In *Morris* v. *Commonwealth* (1948), 306 Ky. 349, 354, 208 S.W. 2d 58, 60, the court stated: "We invariably have held that the head of a house, or the one in charge of the house at the time a search is made, may consent to its search, and such consent will render competent the evidence thus obtained. It is not necessary for the defendant himself to give consent, unless he is the head of the house or in charge of the premises at the time the officers commence the search."

Texas follows basically the same use and occupancy test as Illinois (*Sorensen* v. *State* (Tex. Crim. App. 1972), 478 S.W. 2d 532), but the court noted in *Sorensen* at page 533, in upholding a search of the mother's house with her consent, that "She had never been instructed to stay out of his [the son's] room ***", thus adding the consideration of a reasonable expectancy of privacy facet to that test.

On the other hand, some courts have implicitly or explicitly rejected the *Kinderman* rationale. These courts are those which reach the waiver question. In *State* v. *Evans* (1962), 45 Hawaii 622, 372 P. 2d 365, the Supreme Court of Hawaii held that a search made with a wife's consent could not be valid as to the husband's personal effects. The Supreme Court of the State of Arizona has said in *State* v. *Pina* (1963), 94 Ariz. 243, 247, 383 P. 2d 167, 169, "It is the better rule that a spouse is not im-

pliedly authorized by reason of the husband-wife relationship to waive constitutional protection."

Turning to the question of whether the defendant in this case had a reasonable expectation of privacy in the quarters which were searched, under the stipulated facts, the son locked the bedroom door and told his mother not to enter and not to allow anyone else to enter. She offered no objection to his request. Regardless of whether the defendant had a reasonable expectation of privacy before the door was locked, there is no doubt that such an expectation was reasonable in view of the mother's past actions in the room, and her failure to object to his request that she was not to open the locked door. The property right of the mother in the locked rooms should be considered only to the extent that it bears on the reasonableness of the defendant to expect her not to exercise those rights. In view of the entire factual situation involved, we find that the defendant reasonably expected that his mother would neither enter the quarters herself, nor allow others to enter.

Having established that the defendant had a reasonable expectation of privacy in the locked quarters, the seizure of the contraband was in violation of his fourth-amendment rights if no valid waiver of those rights was effected.

There is no evidence in the record which tends to establish that the defendant voluntarily waived his fourth-amendment rights.

Under the *Katz* test, the starting point is whether the son believed that his mother would not enter the locked rooms or allow others to enter. It is apparent from the mere fact of the precautions taken that he believed that

the locked rooms would not be gone into by anyone. The next question is whether this belief was one which society views as being reasonable. It is at this point in the analysis of the case that care must be taken to separate out strict property law concepts from the finding of reasonableness. The test cannot be made merely on the basis of the mother's property right in the house, but rather consideration should be given to whether the totality of her actions as to the son made his expectation of privacy reasonable. The court properly found that the defendant's mother had set aside these rooms for the defendant's exclusive use, subject to her using the area for housekeeping purposes and for caring for his personal effects.

The question still arises as to whether the police were acting reasonably in assuming a grant of authority from the son to the mother to open the locked rooms when the mother did not explicitly mention any such grant, and indeed after she informed them that she had been told to stay out of the rooms. It must be admitted that, in the face of such knowledge, the police knew that the defendant was in no way consenting to their search of his property.

Since we hold the fourth-amendment rights protect persons, not simply areas, and since there was no valid waiver of these rights, the appellate court must be affirmed.

We should, however, also address ourselves to the proposition urged by the State that the recent decision of *Coolidge* v. *New Hampshire* (1971), 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, serves to validate searches such as that which took place here. The relevant portion of the *Coolidge* decision phrased the test for third-party

consent as, "*** whether Mrs. Coolidge, in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state when she produced her husband's belongings." (403 U.S. 443, 487, 29 L. Ed. 2d at 595.) The crux of the argument is that as Mrs. Coolidge was not operating as an instrument of the police, there was no State action, and therefore no violation of the defendant's fourth-amendment rights. The theory is that no "search" was made at all, but rather there was a voluntary turning over to the police of the defendant's property by Mrs. Coolidge, a private citizen.

That evidence which would be inadmissible if seized by the police is admissible if seized by some nonpolice related third-party, is established in both the Illinois and Federal courts. *Gindrat* v. *People* (1891), 138 Ill. 103, *Burdeau* v. *McDowell* (1921), 256 U.S. 465, 65 L. Ed. 1048, 41 S. Ct. 574.

This case is distinguishable on its facts from *Coolidge*. The police in *Coolidge* were questioning Mrs. Coolidge after her husband had been interrogated in reference to a kidnapping-murder. They asked her whether her husband owned any guns, and she voluntarily produced 4 guns and handed them to the police. They asked if she knew which pants her husband had worn on the evening of the disappearance, and she provided the police with four pair of pants, claiming he had worn one of the four on the evening in question. The actions of Mrs. Coolidge in obtaining these articles and handing them over to the police was done without the request of the police. The court specifically found no coercion to be present. Therefore, there was no search by a government representative. The court noted specifically (403 U.S. at 488) that the

police did not go to the Coolidge residence for the purpose of rummaging around.

On the other hand, the sole purpose of the police in the instant case was to rummage through the rooms, which had been occupied and then locked by the defendant. Although they went at the request of the defendant's mother, it was the police and not the mother who entered the locked rooms by use of a skeleton key. It was the police, while rummaging through the room, who discovered the contraband. This case is clearly an example of government action. *Coolidge,* therefore, does not validate this search.

In summary, we find that the defendant had a reasonable expectation of privacy, and that this reasonable expectation was afforded the protection of the rights granted by the fourth amendment. No valid waiver of rights having been made, and a search by policemen having been performed, the defendant's fourth amendment rights were violated and the evidence seized during this search is inadmissible.

The judgment of the appellate court is therefore affirmed.

Judgment affirmed.

MR. JUSTICE SCHAEFER, dissenting:

The opinion of the majority is based upon the defendant's "reasonable expectation of privacy." in my opinion what the defendant expected is irrelevant. What is significant is the reasonableness of the conduct of the police officers. Viewed from their perspective, the record shows that they were asked by the defendant's mother to open the locked door and search the area in which the sup-

pressed articles were found. I see nothing in the stipulated facts to indicate that the police officers had been informed of any restrictions upon the mother's right to ask them to do what they did. And in the absence of such an indication, it seems to me that neither they nor we should be concerned with the details of any unusual conditions relating to the minor defendant's occupancy of a portion of his mother's apartment.

MR. CHIEF JUSTICE UNDERWOOD joins in this dissent.

MR. JUSTICE WARD, also dissenting:

I would join in Mr. Justice Schaefer's dissent, and add: The son had "moved out" of his mother's house 10 to 14 days preceding the search requested by his mother. He was no longer a co-occupant of the quarters he had vacated. Under the circumstances I find it strange that the majority can conclude that, by locking a door, forbidding his mother to enter or permit others to enter, the son developed, when his mother made no formal objection, a reasonable expectation of privacy in the rooms from which he had moved. I would not hold that he thereby gave himself a right of sanctuary—of what duration we do not know.

APPENDIX B

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant,

v.

LEE SCOTT NUNN, Defendant-Appellee.
(No. 11571; Judgment affirmed.)

Fourth District—September 27, 1972.

1. SEARCHES AND SEIZURES (§ 9)—*precedents concerning consenter's interest in property are not determinative in considering validity of third party's consent.*

Cases related to nature and extent of interest in property of consenter, relationship of consenter and defendant, and issue of agency or apparent authority, would not be of determinative significance in considering validity of a third party's consent to otherwise invalid search.

2. SAME (§ 2.5)—*protection from unreasonable searches applies to persons, not places.*

Fourth Amendment right to protection from unreasonable search and seizure applies to persons, not places, and to minors as well as adults.

3. SAME (§ 9)—*when entry of defendant's room in mother's home with mother's consent constitutes unlawful search.*

Police officers' entry into 19-year-old defendant's locked bedroom which had been set aside for defendant's exclusive use in his mother's home, subject only to her mainten-

ance and caring for his personal effects therein, would be held to be violative of defendant's constitutional privilege against unlawful search and seizure notwithstanding mother's consent to entry without a warrant, thereby rendering inadmissible in subsequent prosecution evidence found in area adjacent to bedroom. (U.S. Const. amend. IV).

TRAPP, P.J., dissenting.

APPEAL from the Circuit Court of Champaign County; the Hon. FREDERICK S. GREEN, Judge, presiding.

Lawrence E. Johnson, State's Attorney, of Urbana, (James B. Burgess, Jr., Assistant State's Attorney, and L. Keith Hays, Senior Law Student, of counsel,) for the People.

Donald M. Reno, Jr., of Reno, O'Byrne & Kepley, of Champaign, for appellee.

Mr. JUSTICE CRAVEN delivered the opinion of the court:

Certain items of evidence were seized by the police from a room occupied by the defendant in his mother's home under factual circumstances related in the following stipulation. A motion of the defendant to suppress this evidence was allowed following an evidentiary hearing. This is an appeal by the People from the order of suppression. We affirm.

The facts are stipulated as follows:

> "On May 17, 1971, a hearing was held before the Honorable Frederick S. Green of the Circuit Court of the Sixth Judicial Circuit, Champaign County, Urbana, Illinois, on a motion to suppress certain evidence which was seized during the search on March 9, 1971, of the premises at 714 South State Street, Champaign, Illinois, the home of Mrs. Rose A. Nunn, mother of Defendant-Appellee.

On March 9, 1971, the date of the search, Defendant was nineteen years of age and had lived in Mrs. Nunn's home. During the time Defendant lived in Mrs. Nunn's house, there were no restrictions on her access to his room and no conversation whether police could enter therein. Mrs. Nunn's only activity in Defendant's room was to clean it, to make his bed and to change the linen. Defendant paid no rent, but gave Mrs. Nunn five to ten dollars a week intermittently. Defendant could not recall the date he last worked prior to March 9, 1971.

Mrs. Nunn became concerned about the activity in her home during her absence when she returned and found a marble top table broken. She discussed her concern with her former husband, the father of Defendant. Mr. Nunn unofficially tried to effect a search of Defendant's room by the police. Police declined unless Mrs. Nunn gave written consent. She went to the police station and gave written consent. She accompanied police officers to her home and was present during the search thereof. Police utilized their pass key to facilitate entry to Defendant's room.

The evidence, which was the subject of the motion to suppress, was seized from a waste basket and a cabinet over the sink both located in the kitchen. This kitchen was accessible only from Defendant's room.

Approximately ten to fourteen days next preceding the search, Defendant moved out, locked the door to his room and told Mrs. Nunn to allow no one to enter.

The Court found: that the area in which the suppressed articles were found had been set aside by the mother of the Defendant for his exclusive use, subject to her using the area for maintenance purposes and for caring for his personal effects, and that said mother had no authority to consent to the search.

The Court allowed the motion to suppress."

Stipulation of facts is a commendable practice and one which this court encourages. In this case, however, we ordered a transcript of the hearing filed in a quest for additional factual information. Such transcript furnishes no substantial additional facts to supplement those found in the stipulation.

The issue presented by this appeal is whether the consent of the mother to the search under the circumstances related validates the warrantless search and seizure of the locked premises when the same is challenged by the defendant. This inquiry compels an examination of search and seizure cases which initially discussed a question of waiver of defendant's constitutional rights by another under the doctrine of implied consent or apparent authority or sufficient possessory interest to validate the consent. In *Amos* v. *United States* (1920), 255 U.S. 313, 65 L. Ed. 654, 41 S. Ct. 266, in discussing the authority of a wife to consent to a search for evidence to be used against her husband, the court intimated that such consent would not validate the search. The specific holding, however, was to the effect that the consent there under review was coerced. Forty years later in *Chapman* v. *United States* (1961), 365 U.S. 610, 5 L. Ed. 2d 828, 81 S. Ct. 776, the court held that a landlord who suspected that his tenant was operating a still and who had certain interests in the property, although the tenant had possession, could not validly consent to a search of the leased premises. In the course of the opinion in *Chapman* the court seemed to rule out the importation into the law of search and seizure the subtle distinctions of property law. Such importation was deemed to be "unnecessary" and "ill-advised." In *Stoner* v. *California* (1964), 376 U.S. 483, 11 L. Ed. 2d 856, S. Ct. 889, the court refused to import

into the law of search and seizure the niceties of the law of agency or the doctrine of "apparent authority" and in that case held that a hotel clerk was not authorized to permit search of a guest's room. The court rejected an argument based upon agency or apparent authority as "unpersuasive" and said:

> " • • • Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained application of the law of agency or by unrealistic doctrines of 'apparent authority.' As this Court has said, "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law evolving the body of private property which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical • • •. [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime. *Jones* v. *United States*, 362 U.S. 257, 266-267, 4 L. Ed. 2d 697, 705-706, 80 S. Ct. 725, 78 A.L.R. 2d 233.
>
> It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room."

In *Jones* the court held that a defendant's standing or right to object was a personal right of the defendant and was not dependent upon the extent of his property or possessory interest in the premises searched.

In discussing the scope of the Fourth Amendment protection against unreasonable search and seizure in *Katz* v. *United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507, while not there concerned with third party consent, the court clearly indicates that the Fourth Amendment protects people—not places or areas—and that which is sought to be protected is an individual's entitlement to know that he is free from unreasonable search and seizure or governmental intrusion.

In *Mancusi* v. *DeForte*, 392 U.S. 364, 20 L.Ed.2d 1154, 88 S.Ct. 2120, the Fourth Amendment right was equated to "a reasonable expectation of freedom from governmental intrusion." In *Combs* v. *United States* (40 L. Week 4917) (U.S.), 33 L.Ed.2d 308, 92 S.Ct., the court again discusses, in the language of *Mancusi*, the defendant's reasonable expectation of freedom from governmental intrusion upon the searched premises.

1. Thus, it appears to us that the cases relating to nature and extent of the interest in the property of the consenter, the relationship of the consenter and the defendant, and the issue of agency or apparent authority are of historical, rather than determinative, significance in considering the validity of a third party consent to an otherwise clearly invalid search. See 20 *Journal of Public Law* 313 (Emory Law School), and *Washington University Law Quarterly* (Vol. 1967), pp. 12-28, and cases there cited.

2. 3 It is readily apparent here that the area searched had been set aside for the defendant's exclusive use in his mother's home. Everything in the stipulated facts

and in the transcript of evidence before us points to the conclusion that the seized material was in an area where the defendant could reasonably expect freedom from governmental intrusion with or without his mother's consent. The facts clearly negate the existence of authority in the mother, expressed or implied, to make a valid consent to the search. The facts likewise negate any possessory interest in the mother sufficient to authorize a search. The fact of minority does not deprive the defendant of his rights under the constitution of this State or of the United States. There is no suggestion that the Fourth Amendment protection of people, not places, is limited to "adult" people.

In the case of *People* v. *Thomas*, 120 Ill.App.2d 219, 256 N.E.2d 870, the Appellate Court for the Fifth District held that a mother who produced a weapon of the defendant at the request of two police officers had sufficient possessory interest in the house where the defendant lived as to authorize a search. The court cited two Illinois Supreme Court cases in support of its conclusion, both of which related to consent by a wife of a defendant to a search of jointly occupied premises. The holding in *Thomas*, although the factual details are not recited, may well be consistent with the reasonable expectation of privacy concept.

Thus, we conclude that under the test of reasonable expectation of privacy, this search was invalid. If the test is possessory interest, the search was invalid. If the test is implied or apparent authority, the search was invalid. The judgment of the circuit court of Champaign County was correct in its allowance of the motion to suppress and that judgment is affirmed.

Judgment affirmed.

SIMKINS, J., concurs.

Mr. PRESIDING JUSTICE TRAPP dissenting:

The conclusions reached upon the facts in the principal opinion are not persuasive. Defendant's argument itself is not persuasive that the intermittent gift of some five or ten dollars elevated him into the status of a tenant so as to bring this case within the rule of *Chapman* v. *United States,* 365 U.S. 610, 5 L.Ed.2d 828, 81 S.Ct. 776. The stipulation first states that the mother suffered no restriction upon her access to the rooms. Then the defendant "moved out"—an affirmative, volitional act. If anything, such action negates the claim of a tenancy. The locking of the door was a unilateral act that cannot reasonably be said to negate or reduce the mother's right of access or of occupancy in the entire premises.

One is constrained to note that *Mancusi* v. *DeForte,* 392 U.S. 364, 20 L.Ed.2d 1154, 88 S.Ct. 2120; *Combs* v. *United States,* (U.S.), 33 L.Ed.2d 308, 92 S.Ct., and *Jones* v. *United States,* 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725, do not approach the issue of a consent to search by a parent householder. In *Jones,* the issue was "standing" to move to suppress and it was held that one legitimately on the premises had such standing. The actual tenant was not present and there was no issue of consent by the occupant having control of the premises. In *Mancusi,* the issue again was standing to suppress. Defendant had custody of the papers seized in the office occupied by several persons, although such papers were not his private property. This was said to give him standing to suppress, but the opinion explicitly recognizes that defendant's superiors could have given consent, although consent was not at issue. In *Combs,* the defendant had stored stolen whiskey in a shed on his father's farm. The issue was standing to suppress.

There was no issue concerning consent to search by the father. Nor can it be said that *Katz* v. *United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507, is relevant as authority upon these issues. As a paying user of the telephone booth subject to electronic surveillance, the statute of *Katz* was more akin to that of a tenant or of a person entitled to the sole use of the premises.

The cases are not such authority as to overcome a substantial number of cases which have determined that one entitled to the use and occupancy may give a valid consent to a search of the premises.

In *United States* v. *Stone*, 401 F.2d 32, a step-mother gave consent to search the home, including a specific area in the basement where defendant stored personal belongings. The consent was held valid as she had immediate control and occupancy of the premises. In *Bumper* v. *North Carolina*, 391 U.S. 543, 20 L.Ed.2d 797, 88 S.Ct. 1788, it was determined that a grandmother's consent was coerced by the apparent authority of a search warrant, but the opinion supports the inference that but for such fact the consent would otherwise be valid. In *People* v. *Koshiol*, 45 Ill.2d 573, 262 N.E.2d 446, a husband's consent to search was authorized by his right to possession of the premises. There was also involved, as is perhaps the case here, a right to protect himself from his wife's poisonous actions. See also *People* v. *Haskell*, 41 Ill.2d 25, 241 N.E.2d 430.

In *State* v. *Kinderman* (Minn.), 136 N.W.2d 577, defendant resided in the home of his father. The latter consented to a search by police, which included defendant's bedroom closet and other parts of the house. It was held that the parental consent to the search was valid. In *Mears* v. *State*, 52 Wis.2d 435, 190 N.W.2d

184, the mother found stolen furs in her son's closet. Her consent to a police search was held to be valid upon her right to use and occupancy. In *State* v. *Vidor,* 75 Wash.2d 607, 452 Pac. 961, the son was visiting at his mother's home. The mother's consent to a police search was upheld upon the basis of her control and possession of the premises. This rule had been followed in Illinois. *People* v. *Thomas,* 120 Ill.App.2d 219, 256 N.E.2d 870.

In *Coolidge* v. *New Hampshire,* 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, the wife produced her husband's guns and clothes from a closet and turned them over to the police. The issue was whether the conduct of the police was such as to subject the items to the exclusionary rule. The court pointed out that the wife could have taken the items to the police and that such would not have been subject to the Fourth Amendment policy of exclusion. We suggest that such statement is equally applicable to this case.

In *People* v. *Stanbeary,* 126 Ill.App.2d 244, 261 N.E.2d 765, the police were invited into the home by the mother. The tennis shoes which became items of evidence were in plain view upon the floor. Here, the items were in a waste basket and upon a shelf. There is substantial basis for saying that nothing stipulated suggests that the mother was excluded from her use and occupancy of the entire house.

Finally, in *Abel* v. *United States,* 362 U.S. 217, 4 L.Ed. 2d 668, 80 S.Ct. 683, it was held that the matters found in the waste basket of a hotel room after the defendant had moved out were considered in the light of abandoned property and not subject to exclusion. Such view is applicable here.

In the several aspects suggested, the trial court erred in excluding the evidence.

SUPREME COURT, U. S.

FILED

MAR 11 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1026

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

LEE SCOTT NUNN,
Respondent.

BRIEF IN OPPOSITION

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JURISDICTION, CONSTITUTIONAL PROVISIONS, AND OPINION BELOW

The respondent adopts the petitioner's statement on jurisdiction and constitutional provisions. The opinion of the Illinois Supreme Court is reported at 55 Ill.2d 344, 304 N.E.2d 81 (1973), and set forth in the petition appendix, pages A 1-14. The opinion of the Illinois Appellate Court is reported at 7 Ill.App.3d 601, 288 N.E.2d 88 (4th Dist., 1972), and set forth in the petition appendix pages A 15-24.

QUESTION PRESENTED

When the respondent's conduct clearly manifests a reasonable expectation of privacy in the searched premises and that expectation is conveyed to a third party and police officials prior to the search, can that same third party who owns the premises nevertheless effectuate a valid waiver of the respondent's Fourth Amendment rights by consenting to a warrantless search of the premises which were set aside exclusively by the consenting party for the respondent's use.

RESPONDENT'S COUNTER-STATEMENT OF THE CASE

The respondent, 19 years of age, and his mother, Mrs. Rose Ann Nunn, were the sole occupants of a home owned by Mrs. Nunn in Champaign, Illinois. The respondent occupied a bedroom and kitchenette which Mrs. Nunn had set aside exclusively for the respondent's occupancy. The only access to the bedroom and kitchenette was through the respondent's bedroom door.

While the respondent lived with his mother, it was customary for Mrs. Nunn to enter her son's bedroom approximately three times a week to gather his clothes for washing and change his bedding. E. *12, 13 She generally had unrestricted access to her son's room until the specific occasion herein discussed when he locked his room. Mrs. Nunn would receive approximately five to ten dollars a week from her son for the services which she rendered. E. 15

The respondent generally kept his room unlocked. E. 16 Approximately seven to ten days prior to the search the respondent locked his room and told his mother not to enter. E. 11, 19

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* "E." refers to the Excerpts of Record from the trial court hearing which has been filed with the Clerk of the United States Supreme Court.

He had the only key to his room. E. 12 The respondent informed his mother that he had "moved out" although his possessions still remained in the room. E. 12 He further informed his mother that the room was locked and that she was not to go in. E. 12, 19 Mrs. Nunn did not ever object to or question her son as to why he locked the room or restricted her entry. E. 12 She never made any demand on her son for a return of the key. She did not give any indication to him that she had any intention of entering his room in his absence.

During her son's absence Mrs. Nunn became concerned about a table in her house which had been broken while she was at work during the day. E. 17 She surmised that "there must have been something going on" which caused her to be concerned about her son's activity in her house. E. 18 Mrs. Nunn then called her ex-husband, the respondent's father, who had since remarried and had assumed another residence. E. 17, 18

After discussing the matter with the respondent's father, the father then contacted a friend who was on the Champaign police force to inquire about the procedure for the police to search the respondent's locked room. E. 18 The father later informed Mrs. Nunn that the police would need a written consent from her to execute the search. E. 18

Mrs. Nunn then proceeded to the police station where she signed a consent form requested by the police to search her son's locked room. E. 18 Mrs. Nunn described the events at the police station as follows:

> "I told them that Scott was not living there any longer and that he had locked his room and told me that I should not go in his room because he didn't have all his possessions out of there yet and so I, I did not have a key to get into his room so therefore I didn't go into his room."
>
> E. 12

After arriving at Mrs. Nunn's home, the police officers used their own key to gain entrance into the respondent's locked room. E. 13, 14 A search of the kitchenette revealed narcotic substances contained in a cosmetic case. E. 15

The respondent was indicted on the basis of those items seized in the kitchenette.

Respondent's pre-trial motion to suppress these items "for the reason that the respondent's Fourth Amendment rights to be free from the unlawful search and seizure were violated" was granted by the trial court. E. 6 This action was affirmed by the Appellate Court of Illinois, Fourth District, with one Justice dissenting. An appeal was taken to the Illinois Supreme Court. That Court affirmed with three Justices dissenting.

The Illinois Supreme Court's opinion, on the basis of **Katz v. United States,** 389 U.S. 347 (1967), held that the instant search was violative of defendant's Fourth Amendment freedoms.

ARGUMENT FOR DENYING THE WRIT

A

The State's Characterization of This Case as One Involving the Principles of "Betrayal of Personal Confidences" Discussed in Hoffa v. United States, 385 U.S. 293 (1966) Is Erroneous.

The search in question has been held unconstitutional by three Illinois courts. For the first time in their petition the State now advances an argument never heard below—that despite the "betrayed confidence" of the respondent's mother, the search was legal within the purview of **Hoffa v. United States,** 385 U.S. 293 (1966); **On Lee v. United States,** 343 U.S. 747 (1957); **Lopez v. United States,** 373 U.S. 427 (1963); **United States v. White,** 401 U.S. 745 (1971).

The respondent did not convey any "personal confidence" to his mother as that concept is discussed in **Hoffa.** To the contrary, the respondent explicitly manifested a reluctance to place any confidence in his mother when he locked his bedroom door, retained the only key, and refused his mother or anyone else entry. It was the security of the locked door that created the respondent's reasonable expectation of privacy as well as his mother's failure to question his act of locking the door. The respondent's reasonable expectation of privacy was not premised upon any "personal confidence" in his mother.

The case at bar is readily distinguishable from **Hoffa** where the informant was personally invited by the defendant into his hotel room at various times when incriminating statements were freely made by the defendant. Justice Stewart observed in **Hoffa** that:

> "[N]o interest legitimately protected by the Fourth Amendment is involved. It is obvious that the petitioner was not

relying on the security of his hotel suite when he made the incriminating statements . . ."

Hoffa v. United States, 385 U.S. 293 at 302.

Because the respondent relied upon the security of his locked room and not any "personal confidences" of his mother, the State's reliance upon **Hoffa** is misplaced.

On Lee, Lopez and **White** involve revelations to the Government by individuals who were privy to incriminating statements made to them in confidence by the defendants. Those cases recite the proposition that a defendant does not have any constitutionally protected expectation that a person with whom he is conversing will not reveal the conversation to the police. These principles have not been raised or argued below and are inapplicable to the controlling Fourth Amendment issues for the same reasons heretofore stated in the discussion of **Hoffa.**

B

The Illinois Courts Correctly Held That the Respondent's Reasonable Expectation of Privacy Was Protected by Katz v. United States, 389 U.S. 347 (1967).

The reasoning of the Illinois Supreme Court and the Appellate Court begins with the apparently conceded (Petition, p. 6) and obvious fact that an expectation of privacy was created by the respondent in locking his room, retaining the only key, and refusing admittance to his mother. Applying the expectation of privacy concept of **Katz v. United States,** 389 U.S. 347 (1967), the Illinois Supreme Court further held that the respondent's expectation of privacy was reasonable in light of all the surrounding circumstances.

Still, the question remained whether the police acted reasonably in relying upon a consent by the mother who informed

them that she had been forbidden to enter the room and that her son had locked the room and retained the only key.

The Illinois Supreme Court correctly applied the waiver test of **Schneckloth v. Bustamonte,** 412 U.S. 218, 248-9 (1973), to find that the defendant did not voluntarily waive his right to be free from an unreasonable search and seizure effected by the third party's consent.

The respondent contends that the general concept of reasonable expectation of privacy and unreasonable encroachment upon that reasonable expectation of privacy is the governing principle which was enunciated by this Court in **Katz v. United States,** 389 U.S. 347 (1967), and is the principle which has been correctly followed by the Illinois Supreme Court.

Based upon similar factual circumstances, other jurisdictions have applied the reasoning of the Illinois Supreme Court by finding third party waiver searches repugnant to the Fourth Amendment protections of the United States Constitution. See **People v. Flowers,** 179 N.W.2d 56 (Mich., 1970); **United States v. Greer,** 297 F.Supp. 1265 (N.D. Miss., 1969); **Reeves v. Warden, Maryland Penitentiary,** 346 F.2d 915 (4th C.C.A., 1965); **United States v. Poole**, 307 F.Supp. 1185 (E.D. La., 1969); **United States v. Kahan,** 350 F.Supp. 784 (S.D.N.Y., 1972); **State v. Blakely,** 230 So.2d 698 (Fla., 1970); **State v. Evans**, 372 P.2d 365 (Hawaii, 1962); **State v. Pina,** 383 P.2d 167 (Ariz., 1963).

The respondent acknowledges there are other jurisdictions which have reached judgments inconsistent with **Katz** and the Illinois courts in third party consent-waiver situations. However, none of these cases found that the defendant had a reasonable expectation of privacy in the searched premises. See **State v. Kinderman,** 136 N.W.2d 577 (Minn., 1965), cert. denied, 384 U.S. 909 (1966); **State v. Vidor,** 452 P.2d 961 (Wash., 1969); **Jones v. State,** 383 A.2d 184 (Md., 1971); **Mears v.**

State, 190 N.W.2d 184 (Wis., 1971); **Morris v. Commonwealth,** 208 S.W.2d 58 (Ky., 1948), as distinguished **Sorensen v. State,** 478 S.W.2d 532 (Tex., 1972).

This Court recently held that third party consent searches are valid against a defendant if the prosecution establishes that the third party possessed "common authority over or other sufficient relationship to the premises or effect sought to be inspected." **United States v. Matlock,** — U.S. —. See footnote 7.

Before the Champaign police used their own key to search the respondent's locked room, they had already been informed (at the police station) by Mrs. Nunn that the respondent had locked the door, retained the only key, and instructed her not to enter. These facts do not support a finding within the principles announced in **Matlock** that the police reasonably believed that Mrs. Nunn possessed "common authority" or a "sufficient relationship" to the locked room.

It is noteworthy that the Illinois cases cited in footnote 6 of **Matlock** had already been distinguished, if not reversed, by the Illinois Supreme Court in reaching its decision in **Nunn,** 55 Ill. 2d at —, 304 N.E. 2d at 84, petitioner's Appendix at A-6. (See reference to "the **"Shambley** line of cases" which includes **People v. Haskell,** 41 Ill. 2d 25, 28-29, 241 N.E. 2d 430, 432 [1968]: **People v. Walker,** 34 Ill. 2d 23, 27-28, 213 N.E. 2d 552, 555 [1966]).

Our Society recognizes privacy as a basic dignity that this Court must protect. Privacy is imperative whether in a high rise apartment building, college dormitory, or family residence. Third party consent-waiver searches that are executed by police officers with the explicit knowledge that the consenting party is acting against the defendant's expressed and reasonable expectation of privacy violate the most basic protections extended by the Fourth Amendment. The respondent asserts that the judgment of the Illinois Supreme Court represents a salutary recognition of fundamental rights of privacy that the American citi-

zen needs at a time when contemporary urban living continues to erode reasonable expectations of privacy.

The respondent suggests that the manifest available foregoing authority from **Katz** and other courts cited herein dictate that the decision of the Illinois Supreme Court is constitutionally correct and the petition of the People of the State of Illinois for *certiorari* be denied.

CONCLUSION

The respondent had a reasonable expectation of privacy that was properly afforded the protection of the Fourth Amendment as applied by the decision of the Illinois Supreme Court. There was no valid waiver of any Fourth Amendment rights by this respondent. All of the facts in the record justify the respondent's reasonable expectation of privacy that the searched premises would be free from governmental intrusion with or without his mother's consent. The facts clearly negate the existence of authority in the mother, express or implied, to make a valid waiver.

The principle of "betrayed confidences" as argued in the State's petition is not applicable in this case and in view of the fact that this principle was not presented or argued in any of the Illinois courts it should not be reviewed by this Court.

Wherefore, the defendant prays that this Court will deny the Writ of Certiorari.

Respectfully submitted

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